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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/897,823	06/29/2001	Gregory Ashton	8618	9706

27752 7590 09/20/2002

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EXAMINER

FLYNN, AMANDA R

ART UNIT PAPER NUMBER

3751

DATE MAILED: 09/20/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/897,823

Applicant(s)

ASHTON ET AL.

Examiner

Amanda R. Flynn

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 29 June 2001.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-38 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-38 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 June 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Drawings***

1. This application has been filed with informal drawings that are acceptable for examination purposes only. Formal drawings will be required if the application is allowed.
2. The drawings are objected to because reference characters "33," referring to the leg opening margin and "120," referring to the outer leg cuff, have both been used to indicate what appears to be the same structure. A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

### ***Specification***

3. It is unknown to the examiner if the elastomeric film identified as "BEX501" is a trademark of Tredegar Industries, Inc. If so, it should be capitalized wherever it appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner that might adversely affect their validity as trademarks.

### ***Double Patenting***

4. Claims 1, 2 and 7; 16 and 27-30; 31-34; and 35-38 of this application conflict with claims 1; 5-8; 9-12; and 13-16 respectively of Application No. 10/179696. 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency

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in more than one application. Applicant is required to either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

5. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states, "whoever invents or discovers any new and useful process ... may obtain a patent therefore..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

6. Claims 1, 2 and 7; 16 and 27-30; 31-34; and 35-38 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1; 5-8; 9-12; and 13-16 of copending Application No. 10/179696. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

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*Claim Rejections - 35 USC § 102*

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claim 1-3, 8-10 and 14 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over U.S. Patent Number 4,690,681 to Haunschild et al.

Haunschild et al. disclose a pre-closed absorbent article, comprising front and back waist regions, a crotch region, front, back and side edges which define leg openings, leg opening margins, longitudinal and lateral centerlines, and a top sheet and back sheet with an absorbent core between the two, as seen in Figure 1. Haunschild et al. further disclose that the unitary margin and cuff of the leg opening has an elastic extensibility of 35-100%. As seen in Figure 1, a portion of the leg cuff 16 is curved. Additionally, Haunschild et al. disclose that the outer leg cuff is differentially extensible, with the inner portion of the leg cuff having an extensibility of 5-25%, while the outer portion has an extensibility of 35-100% (col. 3, lines 55-61). Haunschild et al. also disclose that the crotch region of the absorbent article has a width less than 30% of the overall width of the diaper (col. 4, lines 18-19, 60-61).

As there is no known criticality of the 5kg lateral spreading force, the examiner takes the position that the absorbent article of Haunschild et al. would operate effectively and maintain an elastic extensibility of at least 60%, when subject to a lateral spreading

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force of both more than and less than 5kg, at its uppermost distal point of the leg openings, although not explicitly stated in the Haunschild et al. reference.

*Claim Rejections - 35 USC § 103*

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 11-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al.

Haunschild et al. disclose an absorbent article as previously described, with a leg opening comprising two portions of differing elastic extensibility. Haunschild et al. does not disclose using a leg opening with three portions of elastic extensibility. Additionally, Haunschild et al. does not specify the orientation angle of the leg openings, during the application of a lateral spreading force.

It would have been an obvious matter of design choice to substitute the disclosed two portions of differing elastic extensibility for three portions, in order to improve the ability of the absorbent article to stretch and conform to the wearer. Additionally, the orientation angle of the leg opening will vary with the size and shape of the wearer, including an angle of 30% or less.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the disclosed absorbent article of Haunschild et al. with three portions of differing elastic extensibility to improve the ability of the diaper to stretch and conform to wearers of various sizes.

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12. Claims 4-7, 16-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al. in view of PCT Publication WO 99/60971 to Ashton et al.

Regarding claims 4-7, 15 and 21 Haunschild et al. disclose the previously described absorbent article but do not specify if the outer leg cuffs are wrapped over a portion of the side edge, are discrete, are made of a laminate or have two ends which join to encircle the leg opening.

Ashton et al. disclose a disposable diaper, as seen in Figures 2 and 3, which has a discrete leg cuff, comprising an elastic gasketing cuff 62 which is wrapped over a portion of the leg opening, with two ends which encircle the leg opening, intended to “contain free liquids within the garment (page 22, line 12).” Additionally, Ashton et al. disclose that many components of the diaper are made with a laminate, to improve resistance to leakage and allow for increased stretching during movement.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the disclosed absorbent article of Haunschild et al., with a laminate material and the leg cuff structure disclosed by Ashton et al., to improve resistance to leakage and allow for increased stretching during movement.

Regarding claims 16-20 and 22, Haunschild et al. disclose the absorbent article as described above, but do not specify that the absorbent article have a fastening system.

Ashton et al. disclose the previously described disposable diaper with “tear open tabs” 31 and seams 32, which permit repeated fastening and unfastening of the diaper.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the disclosed absorbent article of Haunschild et al., with the

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fastening system disclosed by Ashton et al., to allow changes to be made to the placement of the diaper by repeated fastening and unfastening of the tabs.

Regarding claims 23-37 Haunschild et al. disclose the above absorbent article but do not specify that the outer leg cuff is made of incrementally stretched laminate.

Ahston et al. disclose the disposable diaper previously described and further disclose that incremental stretching methods are employed to make various components of the diaper, but do not specify that this method is used in the formation of the outer leg cuffs. Ashton et al. disclose that incremental stretching methods create a “zero-strain stretch material that is extensible (page 23, line 13).” Additionally, Ashton et al. disclose that the cuff is folded with a free edge disposed adjacent to the inner surface of the containment assembly, via “side-edge-leakage-guard gutters (page 22, line 12),” and that a portion of the outer cuff is continuous with the back sheet (Figure 3).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the disclosed absorbent article of Haunschild et al., with outer cuffs disposed adjacent to the inner surface of the article, and continuous with the back sheet, the cuffs being made by an incremental stretching method to create a zero-strain material that is highly extensible and allows for adequate stretch, while preventing leaks.

#### *. Conclusion*

13. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Patent Number 4,031,568 to Huff discloses a legless panty with a leg opening capable of 100% elongation.



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U.S. Patent Number 4,938,757 to Van Gompel et al. discloses side panels with 10-500% extensibility.

U.S. Patent Number 6,171,290 to Boisse et al. discloses an absorbent article with a cuff capable of at least 60% elasticity.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amanda R. Flynn whose telephone number is 703-306-4056. The examiner can normally be reached on Monday - Friday, 8:30am - 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gregory L. Huson can be reached on 703-308-2580. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.

Amanda R. Flynn  
Examiner  
Art Unit 3751

AF

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September 18, 2002

A handwritten signature in black ink, appearing to read "Gregory L. Huson", followed by the date "9-18-02".

GREGORY HUSON  
SUPERVISORY PATENT EXAMINER  
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